



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R06-OAR-2013-0808; FRL-9912-50-OAR]

#### **Approval and Promulgation of Air Quality Implementation Plans; Withdrawal of Federal Implementation Plan; Texas; Prevention of Significant Deterioration; Greenhouse Gas Tailoring Rule Revisions**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to rescind a Federal Implementation Plan (FIP) for Texas for greenhouse gas (GHG) Prevention of Significant Deterioration (PSD) permitting, with three limited circumstances for retained federal permitting authority. We are removing the majority of the GHG PSD FIP because in a separate but simultaneous action being published elsewhere in this issue of the **Federal Register**, we are finalizing approval of the majority of revisions to the Texas State Implementation Plan (SIP) submitted by the Texas Commission on Environmental Quality (TCEQ) to the EPA on October 5, 2010, and April 16, 2014, that address the state's authority to regulate GHGs and establish an approvable GHG PSD permitting program. The EPA is finalizing this action under Section 110 and Part C of the Clean Air Act (CAA).

**DATES:** This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2013-0808. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment.

**FOR FURTHER INFORMATION CONTACT:** Adina Wiley, Air Permits Section (6PD-R), telephone (214) 665-2115, e-mail [wiley.adina@epa.gov](mailto:wiley.adina@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

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## **I. Background**

The background for today's final action to rescind the Texas GHG PSD FIP, but for three limited circumstances, and the background for the separate but simultaneous final action also being published today to approve the majority of revisions to the Texas SIP, are discussed in detail in our February 18, 2014, proposal (79 FR 9123). In that document, we proposed to approve portions of two revisions to the Texas SIP submitted by the TCEQ on October 5, 2010, and December 2, 2013. The December 2, 2013, submittal was a request for parallel processing of revisions proposed by the TCEQ on October 23, 2013. Our February 18, 2014, proposed approval and accompanying Technical Support Document provide the EPA's evaluation of the October 5, 2010, and December 2, 2013, revisions to the Texas SIP that would provide for the regulation of GHG emissions in the Texas PSD program and clarify the applicability of BACT for all PSD permit applications. We preliminarily determined that the revisions were consistent with the CAA and the EPA's regulations and guidance for the permitting of GHG emissions in the PSD program. Therefore, we proposed approval of the SIP revisions and simultaneously proposed to rescind the GHG PSD Federal Implementation Plan (FIP) for Texas with the exception of the three limited circumstances for retained federal permitting authority.

The December 2, 2013, submittal was a request for parallel processing; meaning that the EPA proposed a rulemaking action on a proposed SIP revision concurrently with the State's public review process. As discussed in our separate but simultaneous final approval action on the Texas SIP revisions published elsewhere in this issue of the **Federal Register**, the EPA evaluated the April 16, 2014, final Texas SIP submittal and determined that the changes made by the TCEQ at adoption are not material changes to the regulations that we proposed to approve; and therefore do not alter our rationale presented in the February 18, 2014 proposed approval. By extension, the underlying rationale for the proposed rescission of the majority of the Texas GHG PSD FIP remains unchanged from proposal. However, as discussed in Section II of this final FIP rescission and the separate but simultaneous final SIP approval, the EPA is not acting on certain sections of the April 16, 2014, submittal that are no longer necessary after the recent United States Supreme Court decision, *UARG v. EPA*.

In this action, the EPA is finalizing only the rescission of the majority of the Texas GHG PSD FIP. We are also finalizing in a separate but simultaneous action published elsewhere in this issue of the **Federal Register** the approval of the majority of the above referenced revisions to the Texas PSD SIP. Therefore, as of the effective date of this final action, the TCEQ becomes the primary permitting authority for GHGs, except in the three limited circumstances described in this final action. As explained in our separate but simultaneous final SIP action, we explain in the final notice the recent United States Supreme Court decision, *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA)* (No. 12-1146). We discuss in that notice that we are finalizing the majority of the proposed approval of the Texas SIP revisions but are not acting on certain sections of the submittal that appear no longer necessary after the decision. Please see that notice for further discussion.

## **II. Recent *UARG v. EPA* U. S. Supreme Court Decision**

### *A. Overview of the Decision and Implications for this Action*

On June 23, 2014, the United States Supreme Court issued a decision addressing the application of stationary source permitting requirements to GHGs in *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA)* (No. 12-1146). The Supreme Court held that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit, but that the EPA could continue to require that PSD permits, otherwise required based on a source's emissions of conventional pollutants ("anyway" sources), contain limitations on GHG emissions based on the application of the BACT.

The Supreme Court reversed in part and affirmed in part the decision of the D.C. Circuit Court that upheld several EPA actions addressing PSD permitting requirements for greenhouse gases including the Tailoring Rule.<sup>1</sup> Although the Supreme Court concluded that "EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse gas emissions," 134 S.Ct. at 2449, it did not specifically identify particular provisions of the EPA regulations it was striking down. Thus, pending further action by the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) and EPA action to revise the regulations in accordance with a more specific remedy ordered by the D.C. Circuit, the provisions of 40 CFR 51.166 that provide criteria for EPA approval of state PSD permit programs remain in the Code of Federal Regulations. This includes 40 CFR 51.166(b)(48)(v), which addresses permitting of "Step 2"

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<sup>1</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 June 3, 2010. See also our February 18, 2014, Proposal (79 FR 9123) for a full background discussion.

sources that emit greenhouse gases in excess of 100,000 tons per year and no other pollutants over the major source thresholds. In light of *UARG*, the EPA is not requiring PSD permits, either directly or through state implementation plans for sources emitting greenhouse gases at any level unless a source emits a regulated pollutant other than greenhouse gases above the statutory major source thresholds. That means that the EPA will not apply or enforce regulations that would require states to include in their SIPs a requirement that “Step 2” sources obtain PSD permits. Thus, despite the fact that 40 CFR 51.166(b)(48)(v) remains in the Code of Federal Regulations at this time, in light of the Supreme Court’s decision the EPA is not taking action on the provisions of the Texas SIP that would require a stationary source to obtain a PSD permit if GHGs are the only pollutant (i) that the source emits or has the potential to emit above the major source thresholds, or (ii) for which there is a significant emissions increase and a significant net emissions increase from a modification.

The Supreme Court also affirmed the lower court’s decision that the BACT requirement applies to GHG emissions from new and modified sources that trigger PSD permitting obligations on the basis of their emissions of air pollutants other than GHG (also known as “Step 1” or “anyway” sources). The Court concluded that “EPA may continue to treat greenhouse gases as a ‘pollutant subject to regulation under [the Clean Air Act]’ for purposes of requiring BACT for ‘anyway’ sources.” 134 S.Ct. at 2449. Accordingly, the PSD BACT requirement continues to apply to greenhouse gas emissions from any new or modified source that is otherwise subject to PSD requirements as a result of its emissions of a criteria pollutant (i.e. to an “anyway” source), and EPA will continue to implement existing regulations that limit application of the statutory BACT requirement to greenhouse gases where the construction

project to be completed would emit at or above a level of 75,000 tpy of CO<sub>2</sub>e as provided in 40 CFR 51.166(b)(48)(iv).

The EPA and D.C. Circuit have long recognized, and the D.C. Circuit's decision affirmed by the Supreme Court further confirmed, that PSD requirements apply to emissions of PSD pollutants "by automatic operation of" the Clean Air Act. *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 115 (D.C. Cir. 2012). The Supreme Court rejected "a greenhouse-gas-inclusive interpretation of the PSD and Title V triggers," because the CAA does not allow the Agency to "treat greenhouse gases as a pollutant for purposes of defining a 'major emitting facility' (or a 'modification' thereof) in the PSD context." 134 S.Ct. at 2442, 2449. But the Court did not question the longstanding interpretation of the EPA and the D.C. Circuit court that the CAA PSD permitting requirements automatically apply to major source emissions of pollutants that *are* "subject to regulation" under the Act. 134 S.Ct. at 2442 n. 6. *See also UARG*, 134 S.Ct. at 2435 ("it is unlawful to construct or modify a 'major emitting facility' in 'any area to which [the PSD program] applies' without first obtaining a permit."). To the contrary, *UARG* affirmed the portion of the D.C. Circuit's decision holding that the BACT requirement clearly applies to greenhouse gas emissions from "anyway" sources and that such PSD requirements apply to sources automatically by operation of the Clean Air Act. Accordingly, the EPA does not interpret *UARG* to alter the settled understanding that the BACT requirement automatically applies to a pollutant (including greenhouse gases) once it becomes subject to regulation under the Clean Air Act. Thus, consistent with the Supreme Court's holding that EPA can "continue to" require compliance with the BACT requirement in the Clean Air Act, 134 S.Ct. 2449, the EPA will continue to apply the BACT requirement to greenhouse gases under its existing regulations applicable to EPA's review of state implementation plans,

including 40 C.F.R. 51.166(j), 40 C.F.R. 51.166(b)(12), 40 C.F.R. 51.166(b)(49), and 40 CFR 51.166(b)(48)(i)-(iv).

The Supreme Court noted that the EPA could exercise its discretion to limit application of BACT to sources with the potential to emit greenhouse gases above a *de minimis* threshold, but that if EPA wished to do so, it would need to justify such threshold for application of BACT to GHGs on proper grounds. The Court observed that when EPA established the existing 75,000 tpy threshold the Agency did not characterize it as a *de minimis* level. 134 S.Ct. at 2449. Rather, that threshold represents a level that EPA determined to be both administratively feasible for permitting authorities to implement and reasonable for sources to comply with. 75 FR 31514, 31560 (June 3, 2010). EPA is considering additional action to establish a *de minimis* threshold for application of the BACT requirement to GHGs. Pending additional action by EPA addressing the threshold for application of the BACT requirement to greenhouse gases, the Agency will continue to apply the existing regulations that require a state PSD program to apply the PSD BACT requirement to GHG emissions from “anyway” sources that emit or have the potential to emit 75,000 tons per year tpy or more of GHG on a carbon dioxide (CO<sub>2</sub>e) basis. With respect to modified “anyway” sources, the EPA is presently reading its regulations to require that state PSD programs apply the PSD BACT requirements to GHG if both of the following circumstances are present: (1) the modification is otherwise subject to PSD for a pollutant other than GHG; (2) the modification results in a GHG emissions increase and a net GHG emissions increase equal to or greater than 75,000 tpy CO<sub>2</sub>e and greater than zero on a mass basis.

Based on information submitted by TCEQ, EPA concluded in its Notice of Proposed Rulemaking that TCEQ had provided sufficient assurance that it has the legal authority,



personnel, and funding to implement PSD permitting requirements for greenhouse gases.

Following the *UARG* decision, the State of Texas has argued in litigation before the D.C. Circuit that GHGs are not presently subject to regulation under the PSD program and that EPA must conduct additional rulemaking to establish a *de minimis* level before the BACT requirement can be applied to greenhouse gas emissions in PSD permits required for construction at anyway sources. Nevertheless, the TCEQ has communicated to the EPA that it “continues to pursue EPA approval of [its] SIP submittal ... so our agency has the full authority to implement the greenhouse gas permitting program in Texas.”<sup>2</sup> The State has further stated that “[r]egardless of litigation positions, we are currently advocating and might pursue in the future, we think it is necessary for TCEQ to assume this permitting role and issue PSD permits for greenhouse gas emissions.” Based on information supplied by TCEQ before the proposed rule and this additional assurance, EPA concludes that Texas intends to implement the PSD permitting requirements for greenhouse gases consistent with EPA’s understanding of those requirements, as articulated above, and that TCEQ continues to have sufficient legal authority to do so. Furthermore, TCEQ has provided sufficient assurance that it will commit the personnel and funding necessary to issue PSD permits addressing greenhouse gases, notwithstanding the State’s ongoing efforts to persuade the court that such permits are not required under the Clean Air Act until EPA conducts further rulemaking. EPA’s rescission of the majority of the FIP and its approval of the majority of the Texas GHG SIP are predicated on the understanding that the State of Texas will implement the PSD program requirements for greenhouse gases in accordance with TCEQ’s representations.

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<sup>2</sup> On October 1, 2014, the TCEQ sent EPA Region 6 a clarification letter in light of the *UARG v EPA* decision. That letter is also posted in the public docket to this rulemaking.

In sum, therefore, the EPA is taking no action on the portion of the Texas SIP submittal requiring sources to obtain PSD permits based solely on their emissions of GHGs, but is otherwise finalizing its rescission of the majority of the FIP and its approval of the majority of the Texas SIP submittals as discussed in the separate final SIP action published elsewhere in this issue of the **Federal Register**.

*B. Changes to the Transition Process as a result of the UARG v. EPA decision*

The EPA must also consider how the July 23, 2014, Supreme Court decision in *UARG v. EPA* will impact our final FIP rescission and simultaneous SIP actions. In our February 18, 2014, proposed rulemaking we identified the following three possible circumstances for retaining federal GHG PSD permitting authority: 1) the EPA would retain permitting authority for any pending permit application where the permit applicant submitted a written request to remain with EPA for permit issuance, 2) the EPA would retain permitting authority for any pending permit applications where the permit applicant did not submit a written request regarding permit authority and the EPA had made a proposed determination through a public-noticed draft permit upon the signature date of the EPA's rescission of the GHG PSD FIP, and 3) the EPA would retain permitting authority over any permit that was issued but had not yet completed the administrative and judicial review process. In conjunction with our February 18, 2014, proposal we issued the "Transition Process for Pending GHG PSD Permit Applications and Issued GHG PSD Permits Upon Rescission of the GHG PSD FIP" (the Transition Process). As specified in this Transition Process, the EPA sent letters to each existing pending permit applicant requesting a written response by May 15, 2014, regarding whether EPA should retain responsibility for

processing the permitting application or transfer it to the TCEQ. We received such a response by the May 15, 2014 deadline from all of the initial GHG PSD permit applicants.

Since the time of our proposed rulemaking, we have received additional GHG PSD permit applications. For the purposes of the Transition Process and our final action today rescinding the Texas GHG PSD FIP, these GHG permit applicants would be considered pending permit applications. According to our February 18, 2014, proposed action, the EPA would retain authority over any of these permit applications where we had not proposed a draft permit at the time of final signature on the FIP rescission. However, because of the Supreme Court's *UARG v. EPA*, this has created some delay in the issuance of a final action on the proposed Texas SIP approval and FIP rescission. As such, these pending permit applicants were not afforded the same opportunity to communicate with the EPA that was provided to the other permit applications, submitted to the EPA, at the time of our February 18, 2014, proposed approval. We believe it is appropriate to modify our retained FIP authorities such that the EPA will retain permitting authority for any pending permit application submitted after our February 18, 2014, proposal that did not respond in writing to the EPA by May 15, 2014, regardless of whether the EPA has published public notice of a proposed permit. We will retain the permitting authority and proceed with our evaluation and processing of the permit application until the applicant submits a written request to be transferred to the TCEQ, withdraws its application, or the EPA issues a final and effective permit.

In this circumstance, the EPA will consider a request for transfer to be a withdrawal of the application that removes the application from review and further action by EPA Region 6. As discussed in our February 18, 2014, proposed rulemaking, the EPA's permitting authority "will cease upon an applicant's written request to the EPA withdrawing the pending permit

application before a final determination is made.” See 79 FR 9123, 9133. For those applications transferred to the TCEQ for which the EPA has not proposed a draft permit, the Texas SIP-approved public notice process will involve two opportunities for public comment under 30 TAC Sections 39.418 and 39.419 for the Notice of Receipt of Application and Intent to Obtain Permit (NORI) and the Notice of Application and Preliminary Decision (NAPD). In the instances where a permit applicant requests that EPA transfer the permit application to the TCEQ and Region 6 has already public noticed a draft permit, an additional public notice will be necessary to initiate and complete the permitting process in accordance with the process required under Texas procedures approved in the SIP. If the EPA has received any public comments on its draft permit, the EPA intends to contact each commenter to advise them to resubmit comments to the TCEQ pursuant to 30 TAC Sections 39.412 and 55.152.

The EPA's Region 6 will consider such a request to transfer a permit application until the time that Region 6 issues a final permit decision under 40 CFR 124.15(b) of the EPA's regulations. After this point in the permitting process, interested parties who commented on the draft permit will have 30 days to request an administrative appeal of the permit before the EPA Environmental Appeals Board (EAB) under 40 CFR 124.19. During this 30 day period, the EPA will retain authority over the permit and will no longer consider any requests to transfer a permit application. If no party petitions the EAB for review, the permit will become final and effective under 40 CFR 124.15(b). At this point, Region 6 will transfer administration of the final and effective permit to TCEQ. If a party petitions the EAB for review of a final permit decision by Region 6, the EPA will retain authority over the permit until administrative and judicial review proceedings are exhausted with one exception. If a petition for review has been filed with the EAB, the permit does not become final and effective, and EPA Region 6 will still have the

opportunity to withdraw the permit or request that the EAB grant a voluntary remand under 40 CFR 124.19(j). An applicant that wishes to withdraw a permit under EAB review must provide written notice to the EAB that it is doing so. If an applicant wishes for Region 6 to initiate this withdrawal process while administrative review of a permit is pending before the EAB, the applicant will need to communicate with Region 6 in writing that it seeks to withdraw its permit application. The applicant may submit a new permit application to TCEQ after withdrawing its application from the EPA in this manner, but the EPA will not transfer a permit application at this point in the process. If a permit decision is remanded to Region 6 by the EAB, the permit applicant may also request withdrawal of its permit application prior to Region 6 issuing a final permit after remand, but Region 6 will also not transfer a permit application at this point in the process. Once the final permit decision is issued under 40 CFR 124.19(i)(2), the EPA would retain authority under the FIP until the period for seeking judicial review has expired or any judicial review proceedings are completed.

Under the *UARG v. EPA* decision, the U.S. Supreme Court stated that the EPA may not treat GHG as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit. Therefore, consistent with our understanding of the Supreme Court's decision, the EPA will no longer process pending permit applications for "non-anyway" sources or modifications. The EPA will also not transfer the permitting authority for "non-anyway" sources or modifications or any issued "non-anyway" permits to the TCEQ. After the completion of the GHG litigation in the D.C. Circuit, the EPA will determine the best course of disposition of these issued "non-anyway" permits.

In summary, the EPA is finalizing retained permitting authority in the following circumstances:

- 1) The EPA will continue to be the permitting authority for a pending permit application for an “anyway” source or “anyway” modification where the permit applicant submitted a written request by May 15, 2014, that the EPA remain as the permitting authority.
- 2) The EPA will continue to be the permitting authority for any pending permit applications for “anyway” sources or “anyway” modifications submitted after the February 18, 2014, rulemaking. The EPA will continue to evaluate and process the pending permit applications unless the applicant submits a written request to transfer permitting authority to TCEQ prior to Region 6 issuing a final permit decision under 40 CFR 124.15(b).
- 3) The EPA will retain authority over any permit for “anyway” sources or “anyway” modifications that was issued by the EPA or for “anyway” permit applications denied by the EPA for which either the time for filing an administrative appeal has not expired or all administrative and judicial appeals processes have not been completed. Except that, the EPA will not retain authority over a permit if an applicant submits a written request to the EPA to withdraw the permit application while an administrative appeal is pending and Region 6 then withdraws the permit under 40 CFR 124.19(j) or the EAB grants a voluntary remand under 40 CFR 124.19(j) or another appropriate remedy.

### **III. Response to Comments**

We received comments from Air Alliance Houston, the Greater Houston Partnership (GHP), the House Bill 788 Working Group (HB 788 Working Group), Sierra Club, Texas Chemical Council (TCC), Texas Commission on Environmental Quality (TCEQ), Texas Industry Project (TIP), the Texas Oil and Gas Association (TXOGA), the Texas Pipeline Association (TPA), and public citizens on our February 18, 2014 proposal. All comments received on the February 18, 2014, proposed action are available in the public docket to this rulemaking. Following is our summary of each comment relating to the FIP action and our response. The EPA notes that the comments and our responses to comments that relate solely to the SIP action are in the separate but simultaneous final approval notice of those revisions. Comments and responses that relate to both actions are found in both final documents.

*Comment 1:* The TCEQ, GHP, HB 788 Working Group, TCC, TIP, and TPA submitted comments supportive of our proposed action and urge the EPA to proceed with final approval and rescind the associated FIP.

*Response 1:* The EPA appreciates the support of the commenters. No changes have been made to the final FIP action as a result of these comments.

*Comment 2:* The TCC encouraged the EPA to make the FIP rescission effective immediately upon approval of the SIP. As support, the commenters referenced the EPA's final approval action of the Wyoming GHG PSD Program at 78 FR 69998, November 22, 2013.

*Response 2:* The EPA interprets the comment as a request that the EPA make the final approval of the rescission of the GHG PSD FIP and final approval of the GHG PSD SIP effective

immediately upon publication in the **Federal Register** pursuant to the Administrative Procedure Act Section (APA), 5 U.S.C. Section 553(d). As explained more fully in Section IV of this document and in Comment/Response 3, the EPA finds that today's final FIP action and the separate but simultaneous final SIP approval action be made effective immediately upon publication in the **Federal Register**.

The EPA also wishes to clarify that the Wyoming action, cited in the comment as precedent for an immediate effective action, does not utilize Section 553(d) of the APA. The EPA's November 22, 2013 final approval of the Wyoming GHG PSD Program and FIP rescission were both effective 30 days after publication in the **Federal Register**. Specifically, the Wyoming action was published on November 22, 2013, and the SIP approval and FIP rescission were effective on December 23, 2013.

*Comment 3:* TXOGA requested that the final SIP approval and the FIP rescission be effective on the date of **Federal Register** publication rather than waiting 30 days after publication. TIP commented that the EPA should invoke the "good cause" exception in the APA to make the final approval and FIP rescission immediately effective upon publication. TIP suggested that using the good cause exception would: 1) "level the playing field" between Texas GHG permitting and GHG permitting in states with EPA-approved GHG permitting programs; 2) provide economic benefits by allowing consolidation of air permitting for Texas GHG sources at the TCEQ; 3) relieve a restriction imposed by the FIP; and 4) is procedural in nature and does not change substantive requirements for GHG PSD permitting.

*Response 3:* The EPA agrees that this is an appropriate circumstance to make this rule effective immediately upon publication, pursuant to 5 U.S.C. Section 553(d) of the APA. As detailed in



Section III of the final FIP action and in Section III of the separate but simultaneous final SIP approval, we have determined that both the final rescission of the GHG PSD FIP and the separate but simultaneous approval of the GHG PSD SIP be effective immediately upon publication in the **Federal Register**. An immediate effective date is authorized under the APA at 5 USC Sections 553(d)(1) and 553(d)(3). Section 553(d)(1) provides that rulemaking actions may become effective less than 30 days after publication if the rule “grants or recognizes an exemption or relieves a restriction,” and Section 553(d)(3) allows an effective date less than 30 days after publication “as otherwise provided by the agency for good cause found and published with the rule.” First, an immediate effective date is authorized for the rescission of the GHG PSD FIP under Section 553(d)(1), because this rulemaking relieves the requirement that sources obtain both a federal permit and a state issued permit. The immediate effective date helps to relieve the restriction on TCEQ’s ability to issue single GHG PSD permits and will eliminate the dual EPA/TCEQ PSD permit system, which in turn, promotes a more efficient single permitting authority process. Second, we have determined there is “good cause” under Section 553(d)(3) to make this rule effective immediately because it will allow Texas to begin processing complete PSD GHG applications that meet the appropriate federal PSD requirements immediately and it will allow the regulated community to receive PSD permits containing GHG limits, issued by Texas, as soon as possible. An immediate effective date provides Texas with undelayed authority to regulate GHG emissions in PSD permits issued to “anyway” sources and allows Texas to become the sole PSD permitting authority in the State, except in three limited circumstances, as described above. In addition, an expedited transition of the GHG PSD program from the EPA to Texas creates a more efficient use of EPA and State resources, and creates certainty for the regulated community and public. The EPA and the TCEQ have worked closely to ensure Texas

has adequate authority and resources to administer the GHG PSD permitting program without a 30 day delay, which is normally the time required for affected parties to adjust their behavior and prepare before the final rule takes effect. The EPA has determined that moving as expeditiously as practicable to consolidate GHG PSD permitting with the TCEQ PSD permitting program is supported here as the State has the authority and resources to administer the GHG PSD permitting program. The EPA finds that the above reasons support an effective date prior to 30 days after the date of publication under 5 U.S.C. Section 553(d) of the APA for both today's final FIP action and the separate but simultaneous final SIP approval action. We have revised the effective date of our final FIP action as a result of these comments.

*Comment 4:* The EPA should state for the record that GHG permits issued by the EPA may be amended by the TCEQ once permitting authority is delegated.

*Response 4:* As stated in our proposed approval, the TCEQ submitted a letter on January 13, 2014, (available in the docket for this rulemaking) that provided clarity and assurances that the TCEQ has the general authority under the Texas Clean Air Act to administer the EPA-issued GHG PSD permits, including revising or amending those permits in the future. Specifically, the "TCEQ will assume full PSD responsibility for the administration and implementation of final GHG PSD permits issued by the EPA upon notification from the EPA that all administrative and judicial appeal processes have expired or have been completed or concluded...assuming full PSD responsibility includes the authority to ... process and issue any and all subsequent PSD permit actions relating to such permits (e.g., amendments)." See 79 FR 9123, 9132. February 18, 2014. The EPA addresses the commenter's statement about delegation of permitting authority in

our separate but simultaneous final SIP approval also published elsewhere in this issue of the **Federal Register**. No changes were made to the final FIP action as a result of these comments.

*Comment 5:* One commenter found it difficult to provide specific comments due to the pending Supreme Court decision on GHG and asked that the EPA discuss the impact, if any, of the pending Supreme Court decision around GHG.

*Response 5:* See Section II of today's final action for a detailed discussion. Although not specifically referenced in the comment, we believe the commenter's reference to "pending supreme court decision around GHG" refers to the following case before the Supreme Court of the United States: Case 121146; *Utility Air Regulatory Group v. The Environmental Protection Agency* and consolidated cases. The Supreme Court of the United States decided this case on June 23, 2014. In summary, the Supreme Court affirmed in part and reversed in part the lower court's decision on the applicability of the PSD Program to GHGs, rejecting the application of the PSD program to additional sources based only on GHG emissions but affirming the applicability of BACT to GHGs emitted by sources otherwise required to obtain PSD permits based on emissions of other pollutants. Accordingly, the decision has influenced our final action on the April 16, 2014 SIP submittal. In our separate but simultaneous SIP action, the EPA is proceeding with the finalization of the majority of the revisions to the Texas SIP. However, in order to proceed consistent with the Court's decision, the EPA is taking no action at this time on portions of the April 16, 2014 submittal that provided for the permitting of "Step 2," "non-anyway" sources. Please see our final separate but simultaneous SIP final notice for a more detailed discussion.

*Comment 6:* Public citizens submitted several comments regarding the EPA's proposed approval of the GHG PSD SIP, the rescission of the GHG PSD FIP, and the transition process to be used when transferring permitting authority to the TCEQ. Specifically, the commenters are concerned that the transition process is lacking the "voice" of the people on whether the public feels it is the right of the applicant/company to be able to choose the EPA or the TCEQ as the permitting authority without the public's input on pending applications. The commenters urged the EPA to retain the FIP permitting authority in sensitive nonattainment areas such as in Brazoria County, Texas. Finally, the commenters submitted information regarding ozone monitor siting and air quality in Clute, water quality impacts in the Galveston Bay, and maps identifying locations of proposed GHG PSD permits.

*Response 6:* While the EPA appreciates the commenter's concerns about the public having a voice in the selection of a permit authority, we believe the appropriate regulatory and permit transition procedures are in place to ensure any GHG PSD permit, whether issued by the EPA or the TCEQ, complies with all federal PSD requirements, including opportunities for public input. Further, the EPA offered an opportunity for review and comment on our proposed determination that the TCEQ has the requisite authority to address GHGs in the PSD program in Texas upon approval of the SIP and corresponding rescission of the majority of the FIP for GHGs. We received no comments on this specific issue. In the separate, but simultaneous final SIP action published elsewhere in this issue of the **Federal Register**, we are approving the majority of revisions to the Texas PSD SIP, except with the noted exceptions where we are taking no action at this time on certain revisions that appear to no longer be appropriate after the Supreme Court's *UARG v. EPA* ruling. Because of this, the EPA finds the TCEQ has the necessary legal and regulatory provisions in place to successfully implement the appropriate federal requirements for

GHG PSD permitting. Therefore, we are simultaneously rescinding the Texas GHG PSD FIP but for three limited circumstances for retained federal permitting authority, and approving the majority of revisions to the Texas SIP in a separate but simultaneous final action published elsewhere in this issue of the **Federal Register**. Upon the effective date of both of these actions, the TCEQ will have the authority to process applications and issue GHG PSD permits except for the three limited circumstances where the EPA is retaining federal permitting authority. As stated in the EPA's February 18, 2014, proposal and transition document referenced in that action, the EPA contacted each GHG PSD permit applicant who had submitted an application to the EPA at the time of our proposed approval. We provided these permit applicants the opportunity to elect either the EPA or the TCEQ as the issuer of its GHG permit by May 15, 2014. All permit applicants submitted a request for permitting authority by the deadline of May 15, 2014. For the permit applications that have been submitted since the EPA's proposed approval, the EPA is retaining permitting authority and will continue evaluating and processing these permit applications unless and until the applicant submits a written request to transfer to the TCEQ, the EPA issues a final permit, or the applicant withdraws the permit application from the EPA's consideration. The EPA Region 6 GHG website has been updated to identify which permit applications have been retained by the EPA for processing and those which have been transferred to the TCEQ. We will continue to update this website as applicants make their decisions regarding permitting authority. Upon the effective date of our final SIP approval and simultaneous FIP rescission, the EPA will no longer accept applications for GHG PSD permits in Texas. From that point forward, the TCEQ will be the only permitting authority for GHG PSD permits in Texas, with the exception of the three limited circumstances where the EPA retained authority over a permit application or issued permit that has not exhausted all administrative and

judicial appeals. Both the EPA and the TCEQ are required to issue GHG PSD permits that satisfy federal requirements for PSD permitting. In the instances where a permit applicant elected to transfer the permitting authority to the TCEQ and the EPA has already public noticed a draft permit and received comments, the EPA intends to contact each commenter to advise them to resubmit comments to the TCEQ pursuant to 30 TAC Sections 39.412 and 55.152.

Second, in our separate but simultaneous final PSD SIP action published elsewhere in this issue of the **Federal Register**, we are finding the TCEQ has adopted regulations sufficient to regulate emissions of GHGs from “anyway” major emitting sources under the Texas PSD program. As part of the Texas PSD SIP approval final action, a GHG PSD permit application will be subject to the Texas SIP-approved public notice and comment procedures that are consistent with the EPA’s federal PSD public notice requirements at 40 CFR 51.166(q). For new GHG PSD permit applications processed by the TCEQ and those applications transferred to the TCEQ for which the EPA has not proposed a draft permit, the Texas SIP-approved public notice process will involve two opportunities for public comment under 30 TAC Sections 39.418 and 39.419 for the Notice of Receipt of Application and Intent to Obtain Permit (NORI) and the Notice of Application and Preliminary Decision (NAPD). For the subset of permit applications that are transferred to the TCEQ after the EPA has already proposed a draft permit, these applications will either use the NORI and NAPD or will go through a Combined Public Notice under 30 TAC Section 39.412. Opportunity for public review and comment will be provided in all instances where the TCEQ is the permitting authority for a GHG PSD permit application.

We would like to correct one statement from the commenter concerning nonattainment permitting, which is that the EPA should retain the GHG PSD FIP permitting authority in sensitive nonattainment areas. There are no GHG nonattainment areas; the EPA was the

permitting authority only for GHG PSD permits. The TCEQ has been, and continues to be, the permitting authority for Nonattainment New Source Review (NNSR) permits in Texas. In Brazoria County, the EPA was the permitting authority for the GHG PSD permits but the TCEQ was the permitting authority for the NNSR permitting program and all other non-GHG PSD pollutants.

After review and consideration of the additional materials submitted by the citizens, the EPA has determined that the data submitted regarding ozone monitors and air quality in Clute, water quality in Galveston Bay, and maps identifying locations of the proposed GHG PSD permit applications, are beyond the scope of our review and are not relevant to our rescission of the GHG PSD FIP.

No changes were made to the final FIP action as a result of these comments.

*Comment 7:* Several commenters submitted comments regarding the EPA's document titled "Transition Process for Transferring GHG PSD Permitting Authority to TCEQ." These comments are summarized below:

A. Comments about notification to companies regarding the Transition Process:

- TCC suggests that the EPA clarify that letters sent to applicants will not be mailed until the final rule has been published in the Texas Register, on or about April 17, 2014.
- TCC requests that the EPA post a message or announcement on its website indicating that letters concerning the transition process have been submitted to any of the GHG applicants.

B. Comments about the deadline for selecting a permitting authority under the Transition Process:

- TCC suggests the EPA not impose a firm 30-day decision deadline because of concerns that permit applicants selecting the TCEQ as the permitting authority may experience delay in processing of applications if the FIP rescission is delayed.
- TCC requests that the EPA clarify whether a permit applicant will have the opportunity to request additional time beyond 30 days to submit a response regarding permitting authority.

C. Comments about the Transition Process for Issued Permits: TCC, TIP, and TXOGA requested that the EPA reconsider the transition process, such that permit applications currently being reviewed in the Environmental Appeals Board (EAB) could be transferred to TCEQ.

*Response 7:* The EPA appreciates the comments on the Transition Process we will be using to transfer GHG PSD permitting authority to the TCEQ upon the effective date of rescission of the GHG PSD FIP and our simultaneous approval of the majority of the Texas GHG PSD SIP. After consideration of the comments and in light of the recent *UARG v. EPA* decision, we have determined it necessary to amend, in part, our Transition Process and EPA's proposed retained authority under the FIP. Below are our specific responses to the comments raised regarding the Transition Process and how the EPA finds it necessary to amend, in part, our retained authority under today's final FIP rescission.

*Response 7A:* For permit applicants with applications submitted at the time of our February 18, 2014 proposal, we are making no changes to the Transition Process. The EPA has



provided adequate notice to those initial permit applicants regarding the Transition Process. The EPA mailed letters to each GHG permit applicant on file with the EPA on March 27, 2014, requesting a response no later than May 15, 2014. Those letters are available for public access in the docket for this rulemaking action. By communicating with our initial permit applicants immediately following the March 26, 2014 TCEQ Commissioners vote to adopt the GHG PSD revisions, we provided our initial permit applicants with a reasonable amount of time to weigh individual business considerations and respond with a permitting authority request. The letters were delivered to the applicants via the U.S. Postal delivery and email, ensuring multiple means of communication with each applicant. Additionally, our Region 6 GHG Website was updated to indicate the availability for review and comment on the EPA's proposed approval of the Texas GHG PSD SIP, rescission of the Texas GHG PSD FIP, and Transition Process. No changes were made to the final FIP action as a result of these comments.

The EPA recognizes that since the time of our proposed rulemaking, we have received additional permit applications and those permit applicants were not afforded a similar opportunity to select a permitting authority by the May 15, 2014, deadline specified in the Transition Process. For these permit applications submitted after the February 18, 2014, proposal, the EPA is retaining the permitting authority until the EPA either issues a final permit and all subsequent administrative and judicial appeals are exhausted, or the applicant submits a written request to be transferred to the TCEQ, or the applicant withdraws the permit application from the EPA's consideration.

*Response 7B:* The EPA does not believe it is necessary to extend the deadline for requesting a transfer of permitting authority beyond the May 15, 2014 deadline, as specified in our Transition Process for the initial permit applications that were submitted at the time of our

February 18, 2014 proposed action. We received written permit authority requests from all permit applicants, submitted to the EPA, at the time of the proposed notice by the specified May 15, 2014, deadline.

However, in consideration of these comments and in light of the *UARG v. EPA* decision, we have decided that for any permit application that was submitted after our proposed rulemaking, the EPA will retain permitting authority and continue to process and evaluate any pending permit application for an “anyway” source or modification unless or until the applicant submits a written request to transfer the authority to the TCEQ or the applicant withdraws the application from the EPA’s consideration. There is no 30-day time period for decision imposed on these permit applicants. Rather the applicant can make an informed business decision through consultation with the EPA and the TCEQ, up until the EPA has issued a final permit. The EPA’s retained authority under the FIP was revised as a result of these comments.

*Response 7C:* At this time, we intend to transfer all initial permit applications and related materials to the TCEQ where a permit applicant requested the transfer in writing by May 15, 2014, as specified in the Transition Process. Additionally, as discussed above in Responses 6A and 6B, for any permit application submitted after our February 18, 2014, proposed rulemaking, the EPA will transfer the permit application and related materials to the TCEQ where the permit applicant submits a written request to the EPA to transfer to the TCEQ. The EPA will confirm the transfer of the permit application by providing a letter to the TCEQ and the permit applicant wherein we transfer the permit application, related materials, and state that we consider the request for transfer a withdrawal of the application that removes the application from review and further action by the EPA. As discussed in our February 18, 2014, proposed rulemaking, the EPA’s permitting authority “will cease upon an applicant’s written request to the EPA

withdrawing the pending permit application before a final determination is made.” See 79 FR 9123, 9133. A final determination on the permit is made when all administrative and judicial appeals processes have been exhausted. The EPA will retain permitting authority for “anyway” GHG PSD permits that are issued or for “anyway” permit applications denied by the EPA for which either the time for filing an administrative appeal has not expired or all administrative and judicial appeals processes have not been completed. As stated in our Transition Process, a GHG PSD permit applicant has the ability to withdraw the permit application before the EPA and submit a new application to the TCEQ at any time until the permit becomes final. Because a permit does not become final until agency review procedures are exhausted, an applicant can withdraw an application while a permit is under EAB review. No changes were made to the final FIP action as a result of these comments, but we have modified the authority retained by EPA in the FIP for certain permit applications for other reasons.

*Comment 8:* Sierra Club submitted several comments and supporting exhibits requesting that the EPA not approve the GHG PSD SIP and rescind the FIP until the TCEQ submits clarifications regarding access to judicial review for GHG PSD permits. First, Sierra Club commented that if the commission acts on a GHG permit, then the Texas regulations appear to require a party to go through the contested case hearing process in order to exhaust administrative remedies, which is necessary to later seek judicial review. However, HB 788 removes the opportunity for a contested case hearing for GHG permits. As a result, the TCEQ has not adequately clarified the process to exhaust all administrative remedies before seeking judicial review when the commission acts on a GHG permit.

*Response 8:* Because judicial review of PSD permits is important and necessary under the Act, we have reevaluated the Texas judicial review process as it applies to GHG PSD permits issued by the TCEQ. 77 FR 65305, at 65307 (Oct. 26, 2012).<sup>3</sup> The TCEQ provided a letter to the EPA dated May 30, 2014<sup>4</sup> to clarify the judicial review process and the associated administrative remedies with respect to the GHG PSD permits issued by Texas. This letter explains the processes to exhaust administrative remedies and confirms that Texas law provides an opportunity for judicial review of all GHG PSD permits issued by the TCEQ. Texas regulations do not require a party to go through the contested case hearing process in order to exhaust administrative remedies when the commission acts on a GHG permit. Section 50.119(b) provides that “[i]f the commission acts on an application, § 80.272 [Motion for Rehearing] of this title applies.” Further, Section 50.119(c)(3) provides that motions for rehearing may be filed on “the commission’s decision on an application.” Section 80.272 is a procedural provision that sets out the process for filing a motion for rehearing after the commission makes a decision on a permit. State law allows the TCEQ to establish a motion for rehearing via regulation, even when there is no statutory right to a contested case hearing.<sup>5</sup> Section 50.119(c) does not require a contested case hearing for a motion for rehearing to be available. We recognize that the judicial review process under Texas law differs from the administrative and judicial review processes available for PSD permit decisions under 40 CFR Part 124 (opportunity to petition for administrative

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<sup>3</sup> “[W]e interpret the CAA to require an opportunity for judicial review of a decision to grant or deny a PSD permit, whether issued by EPA or by a State under a SIP-approved or delegated PSD program. See 61 FR 1880, 1882 (Jan. 24, 1996) (EPA’s proposed disapproval of Virginia’s PSD program SIP revision due to State law standing requirements that limited judicial review); 72 FR 72617, 72619 (December 21, 2007) (in approving South Dakota’s PSD program, EPA stated: “We interpret the statute and regulations to require at minimum an opportunity for state judicial review of PSD permits”).” 77 FR at 65307.

<sup>4</sup> Clarification Letter from Mr. Richard A. Hyde, P.E., Executive Director, TCEQ to Mr. Ron Curry, Regional Administrator, EPA Region 6 (May 30, 2014) (hereinafter “Judicial Review Clarification Letter”). This letter is available in the docket for this rulemaking.

<sup>5</sup> *Tex. Air Control Bd. v. Travis Cnty*, 502 S.W.2d 213, 215 (Tex. Civ. App.-Austin 1973, no writ); *see also*, *Sproles Motor Freight Line, Inc. v. Smith*, 130 S.W.2d 1087, 1088 (Tex. Civ. App.-Austin 1939, writ ref d).

review by the EPA's Environmental Appeals Board (EAB)) and section 307(b) of the CAA (opportunity to seek review before the federal Circuit Court of Appeals) when the EPA or a delegated agency under 40 CFR 52.21 is the PSD permit issuer. However, the CAA does not require that the process for judicial review of the grant or denial of a PSD permit issued under a SIP approved PSD program be identical to that provided when the EPA or a delegated agency is the PSD permit issuer under 40 CFR 52.21. 77 FR 65305 at 65307 (Oct. 26, 2012). No revisions were made to the final FIP action as a result of this comment.

#### **IV. Effective Date of Final Action**

The EPA has determined that today's final FIP action and the separate but simultaneous final approval of the majority of the Texas GHG PSD SIP are effective immediately upon publication under 5 U.S.C. Section 553(d) of the APA. The expedited effective date for this final FIP action and the separate but simultaneous SIP approval action is authorized under both 5 U.S.C. Section 553(d)(1) and 553(d)(3) of the APA. Section 553(d)(1) allows an effective date less than 30 days after publication if a substantive rule relieves a "restriction." Section 553(d)(3) allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and published with the rule." The EPA has determined that it is appropriate to make both final actions effective upon publication because the final removal of the Texas GHG PSD FIP and the separate but simultaneous final approval of the majority of Texas GHG PSD SIP will both relieve a permitting restriction and there is "good cause" to allow Texas to begin processing PSD GHG applications that meet the appropriate federal PSD requirements immediately. Final immediate action relieves a restriction by promoting an efficient single GHG permit process, supports an efficient use of EPA and State resources, and creates certainty for the

regulated community and public. It provides Texas with undelayed authority to regulate major GHG emitting sources, and the EPA and TCEQ have worked closely to ensure the State has adequate authority and resources to administer the GHG permitting program without a 30 day delay, which is normally the time required for affected parties to adjust their behavior and prepare before a final rule takes effect. The EPA has determined that moving as expeditiously as practicable to consolidate GHG PSD permitting with the TCEQ is consistent with the State's authority and resources to administer the GHG PSD permitting program. The EPA finds that the above reasons support an effective date prior to thirty days after the date of publication under 5 U.S.C. Section 553(d) for both today's final FIP action and the separate but simultaneous final SIP approval action by establishing good cause for making the rule immediately effective and demonstrating that the rule relieves a restriction.

## **V. Final Action**

The EPA is rescinding the GHG PSD FIP for Texas at 40 CFR 52.2305(a) and (b), with three limited circumstances for retained authority for "anyway" source permit applications as specified in the new section of 40 CFR 52.2305(d). First, the EPA retains GHG PSD permitting authority for any pending "anyway" permit applications where the permit applicant submitted a written request to remain with the EPA for permit issuance by the deadline specified in our Transition Process. Second, the EPA will retain GHG PSD permitting authority for "anyway" source permit applications submitted after February 18, 2014, unless or until the applicant submits a written request transferring the permitting authority to the TCEQ. Finally, the EPA will retain GHG PSD permitting authority for any issued "anyway" permit or "anyway" permit application denied by the EPA for which either the time for filing an administrative appeal has not expired or all administrative and judicial appeals processes have not been completed by the

publication date of the EPA's final actions to rescind the GHG FIP and simultaneously approve the TCEQ's PSD SIP submittal. Note, even for those cases where the EPA announces it will retain GHG PSD permitting authority over an "anyway" application, this authority will cease upon an applicant's written request to the EPA withdrawing the pending permit application before a final determination is made. The EPA Region 6 GHG website identifies the permit applications where the EPA retains GHG permitting authority. We intend to update this website as we process the pending permit applications and transfer the issued permits to the TCEQ for implementation. When all permit applications have been processed and transferred to the TCEQ, the EPA will, in a separate action, revise 40 CFR 52.2305 to remove the remaining GHG PSD FIP authority at § 52.2305(a) and (b).

Consistent with the *UARG v. EPA* decision, the EPA does not find it appropriate at this time to act on revisions to the Texas SIP providing the authority to regulate and permit non-"anyway" sources and modifications of GHGs. Therefore, the EPA will not transfer issued non-"anyway" source permits to the TCEQ. The EPA will also not continue to process or evaluate pending permit applications for "non-anyway" sources or modifications.

Our final action today also finds that through a letter dated January 13, 2014, the TCEQ has provided necessary and adequate assurances that the Texas PSD program will be revised in the future to address pollutants that become newly regulated under the CAA after January 2, 2011, and that the TCEQ has the adequate authority under State law to regulate any new PSD pollutants. Therefore, the EPA rescinds the PSD FIP for Newly Regulated Pollutants for Texas at 40 CFR 52.2305(c).

As explained in our February 18, 2014 proposal (see 79 FR 9123), this action is made possible because of our separate but simultaneous final action being published elsewhere in this

issue of the **Federal Register** to approve the majority of the Texas PSD SIP revisions, which updates the Texas SIP to provide for the regulation of GHG emissions for “anyway” sources, and clarifies the applicability of BACT for all PSD permit applications. The EPA has made the determination that the majority of revisions to the Texas SIP are approvable because the revisions meet all applicable requirements of the CAA, and EPA implementing regulations that were not affected by the recent U.S. Supreme Court decision in *UARG v. EPA*. We noted that we are taking no action at this time other certain revisions that appear to no longer be needed in light of that decision. The EPA also has determined under the authority of 5 U.S.C. Section 553(d) of the APA, to make this final FIP action and the separate but simultaneous final PSD SIP approval action effective upon **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Upon the effective date of today’s final FIP action and the separate but simultaneous final PSD SIP approval, the TCEQ will immediately assume responsibility for GHG PSD permitting, with the exception of the three limited circumstances where the EPA is retaining GHG PSD permitting authority under the FIP, as described this final FIP action. As such, all new GHG PSD permit applications will be submitted to and processed by the TCEQ.

The EPA is finalizing this action under Section 110 and Part C of the Act.

## **VI. Statutory and Executive Order Reviews**

### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This FIP withdrawal action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).



*B. Paperwork Reduction Act*

This FIP withdrawal action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* because this partial FIP rescission under Section 110 and Part C of the CAA will not in-and-of itself create any new information collection burdens but simply transfers the permitting authority from EPA to the State. Burden is defined at 5 CFR 1320.3(b). Because this final action does not impose an information collection burden, the Paperwork Reduction Act does not apply.

*C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This rule will transfer the majority of GHG PSD permitting responsibility from the EPA to the State of Texas. This final rule applies to large emitters of GHGs that tend to be large sources. The result of this final action, however, simply is to transfer the majority of authority to administer the PSD program for GHGs from EPA to the State of Texas and does not create any new requirements. The substantive requirement for a source to obtain a PSD permit prior to construction of a new major source of GHGs or modification of an existing major source that will significantly increase GHGs is not changed by this final FIP action. This final FIP action will not impose any new requirements on small entities.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action removes the majority of a Federal plan and transfers most permitting responsibility of GHG emissions from the EPA to the State of Texas. Small governments are not impacted.

*E. Executive Order 13132: Federalism*

This FIP withdrawal action does not have federalism implications. It will not have substantial direct effects on Texas, on the relationship between the national government and the State of Texas, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between the EPA and State and local governments, the EPA specifically solicited comment on the proposed action from State and local officials. The EPA received no adverse comments from state or local governments on this rulemaking but only comments in support from the State.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, the EPA is not addressing any Tribal Implementation Plans. This action is limited to the withdrawal of the majority of the Texas GHG PSD FIP. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because the EPA is withdrawing the majority of the federal GHG PSD FIP in Texas as authorized by the CAA.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

This final rule does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this rule as discussed in Section IV (Effective Date of Final Action), including the basis for that finding.

*L. Petitions for Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL**

**REGISTER**]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* CAA section 307(b)(2); 5 U.S.C. 7607(b)(2).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: October 30, 2014.

Gina McCarthy,  
Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR Part 52 as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for Part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

**Subpart SS – Texas**

2. Section 52.2305 is amended by removing and reserving paragraph (c) and by adding paragraph (d) to read as follows.

**§ 52.2305 What are the requirements of the Federal Implementation Plan (FIP) to issue permits under the Prevention of Significant Deterioration requirements to sources that emit greenhouse gases?**

\* \* \* \* \*

(d) The authority provided in paragraphs (a) and (b) of this section is rescinded except in the three limited circumstances described in paragraphs (d)(1) through (3) of this section:

- (1) The EPA will retain permitting authority for all GHG PSD permit applications for major sources and major modifications required to obtain PSD permits because of emissions of pollutants other than GHGs submitted to the EPA where the permit applicant submitted a written request by May 15, 2014, that the EPA continue processing the application.
- (2) The EPA will retain permitting authority for all GHG PSD permit applications for major sources and major modifications required to obtain PSD permits because of emissions of pollutants other than GHGs submitted to the EPA

after February 18, 2014, unless and until the applicant submits to the EPA a written request to transfer the permitting authority to TCEQ (or withdraws the application) prior to issuance of a final permit decision under 40 CFR 124.15(b).

- (3) The EPA will retain permitting authority for GHG PSD permits issued by the EPA for major sources and major modifications required to obtain PSD permits because of emissions of pollutants other than GHGs and GHG PSD permit applications denied by the EPA for major sources and major modifications required to obtain PSD permits because of emissions of pollutants other than GHGs for which either the time for filing an administrative appeal has not expired or all administrative and judicial appeals processes have not been completed by **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Except that the EPA will not retain authority over a permit if an applicant submits a written request to the EPA to withdraw the permit application while an administrative appeal is pending and the Regional Administrator then withdraws the permit under 40 CFR 124.19(j) or the Environmental Appeals Board grants a voluntary remand under 40 CFR 124.19(j) or another appropriate remedy.